THE PROSPECTS FOR GOVERNMENT ANTITRUST ENFORCEMENT OF TYING AND MONOPOLY LEVERAGING CLAIMS IN CYBERTECHNOLOGY MARKETS

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I am going to talk about the government's prospects for successfully attacking Microsoft or other firms (such as AOL) who allegedly are engaging in what antitrust lawyers and economists refer to as monopoly leveraging and tying.

I have an opinion on whether Microsoft has violated the 1995 consent decree, and indeed, what I immodestly believe is a very well-informed opinion on whether Microsoft has engaged in acts of monopolization, monopoly leveraging and unlawful tying. However, for now, I'll keep them to myself, addressing instead the more important issue of whether the U.S. or perhaps the State Attorneys General have the antitrust weapons they will need to stop Microsoft from what Microsoft allegedly is doing and what other monopolists accomplish through the practice of monopoly leveraging (and a specific type of leveraging -- which we call tying).

My conclusion is that the U.S. and the States do not have the weapons they need. They march into this battle virtually unarmed because this federal antitrust administration and its two immediate predecessors have been steadily attacking and destroying the potential of the antitrust laws to thwart monopoly leveraging conduct.

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Monopoly leveraging, as well as the other antitrust offenses involving the attainment, maintenance or abuse of monopoly power derive from Section 2 of the Sherman Act.

Monopoly leveraging is the willful use of monopoly power in one market to gain an unfair competitive advantage in a second market -- whether or not the first monopoly was legally attained and whether or not the competitive advantage in the second market rises to the level of a second actual or near monopoly. For example, Microsoft with an operating system monopoly (for the sake of argument attained lawfully) ties the sale of its web browser to Windows '95 and gains a one-third market share of the web browser market. "Not enough" Microsoft argues to attain a second actual or near monopoly, but a greater market share than it would have gotten without leveraging its operating system power.

Monopoly leveraging, as Morgan Chu's excellent outline points out, violates Section 2 in some federal circuits. Leveraging is not an offense in other circuits.

Ultimately a Supreme Court decision will resolve this conflict and clarify this crucial substantive issue of antitrust law. I'll go back to that later.

During the 12 Reagan/Bush years, the Antitrust Division and the FTC collectively filed one Section 2 case and the Antitrust Division and FTC collectively filed one tying case, under pressure, after I, on behalf of 33 State Attorneys General, filed a tying case against Sandoz Pharmaceutical Company.

In 1982, the Reagan Antitrust Division walked away from the IBM case filed 13 years earlier -- at a time when it admitted it could have secured IBM's agreement to a consent injunction. The Division also dropped a tying case against Mercedes Benz filed by the Carter Antitrust Division on the eve of a government victory.

Throughout these 12 years, the agencies consistently attacked the legal and economic foundations of the tying and monopoly leveraging offenses. For example, they intervened in private litigation to assert a position about how a court should determine whether products such as operating systems and web browsers are a single (integrated) product or two separate products.

The position which the U.S. asserted, most specifically in the Jefferson Parish Supreme Court case, is precisely the position which Microsoft is asserting against the U.S. now.

The Bush Antitrust Division argued strongly against the so-called "installed base lock-in theory" in Kodak v. Image Technical and was ridiculed by the Supreme Court for doing so. Once again, Microsoft's current position parallels the U.S.'s position in Image Technical.

The economic theory embodied in these U.S. court filings in tying and Section 2 cases involves two basic theoretical premises of what loosely is called the "Chicago School." The first is that leveraging monopoly power from one market into a second adjacent market, -- say operating systems into web browsers (or as with AOL, the Online Service Providers market into the markets for various kinds of on-line content) -- that this kind of monopoly leveraging -- whether accomplished through a tying arrangement or otherwise -- is not anticompetitive. Under the Chicago School pet theory called "Optimum Monopoly Pricing" or "Single Monopoly Profit" a monopolist can gain no greater profit in the two markets than it could gain through profit maximizing monopolistic pricing in the first market alone. The Chicago School conclusion -- monopoly leveraging is not anticompetitive and indeed probably represents some form of efficiency enhancing behavior.

The closely allied second dogma involves the avoidance of "double marginalization." Here the argument is that monopoly leveraging or tying enhances consumer welfare by allowing the monopolist to avoid the inefficiency which occurs when the pricing of two products, which may be used together, are not coordinated (say operating Systems and browsers or online services and content).

During the 12 Reagan/Bush years more that 65% of the "Base" of the federal judiciary was "installed" and we all got "locked into" courts which "bought" the most extreme Chicago School law and economics dogma-hook, line and sinker. Most specifically, these jurists embraced the Chicago School theories involving leveraging and tying, which I just described.

Then came the current Administration, led by former State Attorney General and former antitrust professor Clinton, a professor who wrote the Arkansas amicus curiae brief in the Worthen case which contributed to the establishment of one of the most powerful and enduring cartels in world history: the Visa/MasterCard dual monopoly. Under President Clinton's antitrust agencies, there has been an increase in most traditional areas of antitrust enforcement. The FTC under Bob Pitofsky has initiated and executed several audacious and brilliant enforcement initiatives. However, in the leveraging and tying areas the Reagan/Bush Chicago School Dogma continues to hold sway and indeed has increased. For example, the Federal Trade Commission's purely cosmetic consent decree in the Time Warner/Turner merger case included a gratuitous general endorsement of the efficiency enhancing effects of tying and the FTC justified allowing the vertical integration of a dominant cable programmer with a monopoly cable service on the grounds that it would avoid the problem of double marginalization.

After the deadlock at the FTC on Microsoft, the Antitrust Division did what it did in 1994. Judge Sporkin rejected the consent decree "as not in the public interest" because he concluded that the decree only addressed the very limited problem set out in the Antitrust Division's contemporaneous complaint, rather than the much more significant competitive problems posed by Microsoft, which had been investigated and publicly identified by both the Antitrust Division and the FTC.

Joel Klein (a brilliant appellate lawyer) was brought in to reverse Judge Sporkin and he did. This was a great appellate victory, but this victory rendered the Tunney Act virtually meaningless. Moreover, it may have allowed Microsoft to go forward with its business plan virtually unimpeded. I say "may," because that is the issue which D.C. District Court Judge Jackson may decide, at least in part. However, regardless of whether the Antitrust Division is able to bring Microsoft's current leveraging and tying conduct within the Consent Decree, there is much other leveraging and tying by Microsoft and others that will stand or fall depending upon Federal and State antitrust agencies' willingness to bring monopoly leveraging and tying cases and the receptivity of the federal courts to such cases. This is where the agencies march into battle virtually unarmed, because the federal agencies have continued the destruction of their own antitrust weapons begun in the Reagan/Bush years.

Any lawyer or economist here today who has taken a trip to the Bureau of Economics at the FTC or the Antitrust Division's Economic Analysis Group understands that the attack on antitrust weapons used to challenge leveraging and tying offenses has continued in the Clinton Administration. I think it is fair to speculate that the FTC's Bureau of Economics collectively vomited the day that the Antitrust Division filed the contempt proceeding against Microsoft, because although it charges nothing more than a breach

of the Microsoft Consent Decree, the filing's doctrinal underpinnings are the antitrust laws' antipathy to monopoly leveraging and tying (and also a clever and very well-crafted argument that Microsoft is tying in order to illegally maintain its operating system monopoly).

Why would the Antitrust Division file this case against Microsoft which is so at odds with its often articulated views about leveraging and tying and their economic consequences?

To me, the answer is pretty clear:

This decision comes at a level higher than Joel Klein and higher than Janet Reno.

The Attorney General's rare appearance at the Microsoft press conference was certainly more than symbolic -- it signaled that this initiative was ordered from higher up. It's also a chance for vindication -- vindication of the widely-criticized 1995 Consent Decree and vindication for Joel, who was almost rejected by the Senate after the NYNEX/Bell Atlantic and Pacific Telesis/Southwestern Bell mergers were allowed to proceed unimpeded.

What has this administration done to improve the receptivity of the federal courts to leveraging and tying cases?

Here, again, the Administration has compounded the damage inflicted during the two previous Administrations. I realize (painfully) that there are criteria other than antitrust soundness for selecting Supreme Court Justices, but in Justice Ginsburg, President Clinton selected a circuit court judge who reflexively joined Judge Bork and Doug Ginsburg in the worst sort of Chicago School antitrust dogma. The 1987 Rothery Decision1 is a case in point.

But, in Justice Breyer, President Clinton gave Orin Hatch, the Reagan/Bush antitrusters and the Chicago School their fondest dream. When I had the honor to join Ralph Nader on what was the most Quixotic journey of my professional life --Senate testimony against the Breyer nomination, I predicted, as Ralph will recall, that Breyer would lead the Court to further eviscerate the antitrust laws. Breyer is delivering on my prediction.

Last year, in Brown v. NFL, Justice Breyer slapped down the Clinton antitrust agencies and virtually eliminated the application of antitrust law to the labor markets. Last week, twice citing Circuit Judge Breyer, the Supreme Court eliminated half of the per se rule against vertical price fixing in State Oil v. Khan. And not if, but when, the Court finally takes a pure monopoly leveraging case to resolve the previously mentioned conflict among the Circuits, Justice Breyer will likely write the decision which will say that there is no distinct monopoly leveraging offense in Sherman Action Section 2. He may even once again draw the little triangle which he drew in his Town of Concord First Circuit opinion illustrating his fondness for the theory of "optimum monopoly pricing."

Is there any way out of this inevitable final elimination of the antitrust weapons which are necessary to deal with the core conduct which Microsoft, AOL and other similar monopolists allegedly use to maintain and extend their dominance?

There is really only one. And its quite simple. After nearly a century of standing silent while the Supreme Court says it can vacillate on what it deems to be the true meaning of the antitrust laws2 -- vacillate according to the favorite economic theory of the day -- Congress can reassert its most basic prerogative -- which is not as Senator Hatch seems to think is to hold meaningless hearings about Microsoft. The proper role of the Congress is to make the laws. The last time Congress attempted seriously to spell out precisely what these laws really meant and specifically what they were meant to prohibit (in 1914), they came up short, despite the best efforts of Louis Brandeis and William Howard Taft.

For a start, Congress can restore the monopoly leveraging weapon to Sherman Act Section 2 by a simple enactment. It would say this:

Current Section 2, 15 U.S.C. § 2

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or if any other person, 350 thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Proposed Amended Section 2

Section 2. Every person who shall monopolize, or attempt to monopolize "or engage in monopoly leveraging," or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or if any other person, 350 thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. *"Monopoly leveraging means the intentional use of monopoly power in any line of commerce or in any activity affecting commerce in any section of the country, whether or not such monopoly power was lawfully attained, to gain a competitive advantage in a distinct line of commerce or activity affecting commerce in any section of the country, whether or not such competitive advantage rises to the level of monopoly power or near monopoly power."*

Thank you.

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1 This decision was vigorously attacked by Bob Pitofsky at Judge Bork's Senate confirmation hearings.
2 This right to vacillate is precisely what Justice O'Connor claimed in the Supreme Court's Khan opinion last week.